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No. 724

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

UNITED STATES OF AMERICA ex rel.,
ANTHONY VOLPE,
Petitioner,

vs.

S. D. SMITH, District Director of Immigration,
Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER
On Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

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Petitioner's counsel in the brief in support of petition for a writ of certiorari have endeavored to present concisely the law tending to sustain petitioner's position. Counsel respectfully request that that brief be considered as petitioner's brief on the merits and file this supplemental brief in amplification of some of the concise sections of that original brief.

I.

Opinions of courts below.

The final opinion (of January 11, 1933) of the Circuit Court of Appeals is reported in 62 F. (2) 808.

The first opinion (that of June 21, 1932) of the Circuit Court of Appeals has not been reported. It is in the record at p. 169.

II.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered January 11, 1933. (R. 196.) A petition for rehearing was denied on February 1, 1933. (R. 197.)

The petition for certiorari was filed on February 23, 1933, and on March 27, 1933, an order was entered granting the petition for certiorari.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Section 347, Title 28 U. S. C.

III.

Statement of the case.

We respectfully ask leave to refer to the statement of the case as set forth in pages 9 to 12 of our original brief.

Herein we feel it necessary to discuss some of the assertions in the majority opinion of the Court of Appeals in its statement of the evidence preceding the opinion proper. (R. 180-181.)

Statement of the Evidence in the Majority Opinion.

The majority opinion (in the second opinion of the court, that of January 11, 1933) has, we respectfully submit, misconstrued the record in stating that Volpe "fraudulently" sought and secured a naturalization decree from a state court. The majority said (R. 180):

> "He has never been naturalized as a citizen of the United States, although he fraudulently sought and

> secured a naturalization decree from a state court and a naturalization certificate from the clerk thereof. The state court decree, however, was promptly revoked upon the application of the United States upon a threatened charge of perjury, and the certificate was voluntarily surrendered by him."

The only evidence on this point is that of Volpe (R. 22) who testified that Mr. Schlottfeldt, the naturalization examiner, told Volpe he wanted to cancel the naturalization papers: that Volpe replied, "I got those papers from Judge David in good faith"; that Schlottfeldt said that if Volpe got a lawyer and went to court he would hold him for perjury; that Volpe said, "I don't know what I perjured but I will do what you want and apply for papers again." This testimony was brought forth by the examination of the presiding inspector at the hearing in the presence of Assistant U. S. Attorney Healy. This testimony was never contradicted by Mr. Schlottfeldt. Certainly there was no showing of fraud here.

Judge Alschuler correctly states on page 10 (R. 189) of his dissenting opinion, "It (the record) does not disclose the actual ground for taking back the papers, or vacating the state court judgment granting him citizenship if in fact it ever was vacated."

The majority opinion seems to overlook the ruling of law that the burden of proof of alienage is on the government. *Bilokumsky* v. *Tod*, 263 U. S. 149; 44 S. C. 54, 68 L. Ed. 221. There is only a mere suggestion in the record that Volpe's naturalization decree was "cancelled" but no showing at all approaching the dignity of proof. The government relied on the interrogative statement by the presiding inspector that there was a naturalization file showing that the "order admitting Volpe to citizenship was set aside and the certificate issued to him cancelled." (R. 23.) In what court, if any, for what cause, and upon what plead-

ing or evidence, is not indicated. Certainly the admitted issuance of a naturalization decree to Volpe is not overcome by the suggestion mentioned and this indefinite proof by officers having it within their power to produce the court records and upon whom the law places the burden of such production, does not constitute proof of fraud or even of cancellation, in any proper sense of the word.

We respectfully submit also that the majority opinion herein further misapprehends the record in the statement that when entering at Key West, Volpe falsely stated that he was a naturalized citizen and that his naturalization certificate was in Chicago, and that after this statement was made the inspector examined him no further. Volpe and several members of his party testified that he did not make the false representation of citizenship when entering at Key West. Against this is only the indefinite and incredible testimony of Inspector Phillips to the contrary. In addition the testimony of Inspector Phillips is that of an interested witness produced not at the first hearing but as a make-weight in the reopened hearing. Inspector Phillips claimed that he recognized Volpe personally distinctly as well as the details of his conversation with Volpe almost three years before, notwithstanding that he had in the meantime examined some 20,000 to 30,000 entrants. This testimony as noted by Judge Alschuler is incredible. Inspector Phillips' memory is evidently far from being as perfect as he claims. In addition to the circumstances noted by Judge Alschuler that Mr. Phillips could not describe any of the other members of Volpe's party or his conversation with them, he was unable to recall at the hearing the name of the presiding Inspector Mr. Ellefson with whom he had spent a large part of his time for the few days immediately preceding the testimony at Chicago. (R. 108.)

The statement in the majority opinion that appellant admitted he had been arrested many times (R. 59), is literally accurate but we suggest that if the fact of arrests be considered material, appellant should be given the benefit of an additional statement that he was never convicted of any offense other than the counterfeiting charge. No evidence was introduced at the hearing justifying these unjust arrests.

In addition the Federal courts of review have disapproved attempts to show bad character by proof of fruitless arrests. See *Smith* v. *U. S.*, 161 U. S. 85, 16 S. C. 483; *Glover* v. *U. S.*, 147 Fed. 426.

Judge Alschuler correctly remarks (R. 187) that "there is nothing in the record to show that they (the arrests) had the remotest bearing on his right to re-enter or to remain here."

IV.

Specification of errors.

We respectfully ask leave to refer to the specification of errors as set forth at pages 12-13 of our original brief.

V.

ARGUMENT.

(1) Error in the decision that petitioner was deportable for conviction in the United States of crime before re-entry.

Supplementing the authorities cited in our original brief (pages 15 to 20 thereof), we respectfully refer to the case of *Wong Yow* v. *Weedin*, 33 F. (2) 377 (9th Cir.). In that case Wong Yow was a Chinese born in China who had lived in the United States as a Chinese merchant. He visited China in 1909 and married his first wife. Thereafter returning to the United States he married a second wife in 1915 in Oregon, although his first wife was still living in China and not divorced. In 1927 accompanied by the second wife he again visited China. The second wife died there and Wong Yow returned to the United States bringing with him the first wife. He was ordered deported on the ground that he admitted the commission of a crime involving moral turpitude, "to-wit, bigamy, prior to entry into the United States."

The Court said at pages 378-379:

> "And it has been repeatedly held that for certain purposes, including the running of the statute of limitations, where an alien has been domiciled in the United States for a period, and, having departed therefrom, again returns, the date of his return may be taken as the date of his 'entry.' *Lewis* v. *Frick*, 233 U. S. 291, 34 S. Ct. 488, 58 L. Ed. 967; *Morini* v. *United States* C. C. A.), 21 F. (2d) 1004; *Weedin* v. *Tayokichi Yamada* (C. C. A.) 4 F. (2d) 455; *Ex parte Parianos* (C. C. A.), 23 F. (2d) 918.
>
> While in some respects the Yamada case is closely analogous, the precise question here presented was not involved. And manifestly, if we assume that the return of appellant, a Chinese merchant lawfully domiciled here under treaty provisions, from a visit to his

country, is in law the 'entry' of an 'alien' under the Immigration Act, and then apply the act literally, results incongruous, if not absurd, ensue. All other facts being the same, had he not made this visit, he would not have been deportable upon his admission of the second marriage. In that case he would be subject to deportation only after a 'conviction' upon a charge of bigamy, and upon the happening of that contingency he would still have the two possible avenues of escape from deportation afforded by a recommendation of the trial judge and executive pardon; whereas, under the government's construction of the act, though he committed the offense within this country, he need not be 'convicted,' and he cannot invoke the protection of either judicial recommendation or executive clemency. See *Weedin* v. *Hempel* (C. C. A.), 28 F. (2d) 603.

'Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion.' *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59, 12 S. Ct. 517, 520 (36 L. Ed. 340). Plainly, by the section under consideration, Congress intended to group all aliens deportable for the commission of a crime, into two classes, and the more reasonable view is that the classification was made with reference to the place where the crime was committed, whether in or out of this country. Such in plain language is the statutory characterization of the first class; the phrase being, 'conviction in this country of a crime.' True, when it comes to the second class, the phrase used is, 'prior to entry'; but we are inclined to think that Congress, probably having in mind only a single entry, used the phrase as synonymous with 'out of this country.' Unless that view be taken, the language leads to confusion. For example, under the government's construction, appellant's case falls within both classes. The offense with which he is charged was committed 'in this country,' and it was also committed 'prior to entry,' if for the purposes of the provision his last return be deemed an 'entry.' The commission of an offense entails radically different consequences, depending on where it was committed. In case it was committed in this country, de-

portation is subject to a statute of limitations, is conditioned upon 'conviction,' and may be defeated by either judicial recommendation or executive clemency, whereas, if committed out of this country, 'conviction' is not requisite, nor can resort be had to judicial recommendation or pardon.

Holding as we do that appellant's case falls within the first class, we necessarily conclude that the order of deportation is against the law, and accordingly the judgment below will be reversed, with directions to grant the writ."

(2) The majority opinion as to the false statement construction of the statute seems erroneous.

The reasoning of the majority opinion of the Court of Appeals herein is, we respectfully suggest, devoted not so much to determining what the intention of Congress was in enacting this legislation, but what such intention should have been, as viewed by the majority of the Court. The majority opinion states that aliens entering (re-entering) the United States are subject to inspection. With this statement we agree. However, the majority opinion then states that no alien can lawfully enter except as he meets the physicial, educational and moral requirements which Congress has seen fit to prescribe, in other words, a thorough and complete inspection as to all the statutory requirements. If this means that every alien is deportable to whom the inspector does not give a thorough and complete inspection as to all statutory requirements, we respectfully disagree. The inspector in his own discretion determines the extent of inspection. Evidently Inspector Phillips customarily inspected aliens re-entering from Cuba, only as to identification of person, establishment of United States domicile and return from temporary visit. He said (R. 111) as noted in our original brief:

"If I am positively satisfied that person is what he claims to be, he will be admitted."

This statement of Inspector Phillips seems justified by the rules of the Bureau of Immigration and by the applicable decisions of the courts, thus, Par. 2 of Rule 3, Subdn. I, of Immigration Laws and Rules of March 1, 1927, provides (among other things):

> "That any alien who establishes that he has been previously lawfully admitted to the United States and is returning from a temporary visit of not more than six months to Canada, Newfoundland, St. Pierre Huguelin, Bermuda, Mexico, Cuba, and other islands included in the Bahama and Greater Antilles groups shall be permitted to enter the United States without a passport, an immigration visa, or a permit to re-enter."

Rule 1, Sub. K, Par. 1, of the Immigration Rules of March 1, provides:

> "The head tax shall not be levied in respect of the following classes of aliens: * * *
>
> (g) Aliens lawfully admitted and having a bona fide residence in the United States who, without relinquishing such residence, visit Canada, Newfoundland, Cuba, or Mexico for a temporary period in no instance exceeding six months."

Also (as noted in our original brief) the Court of Appeals, 2nd Circuit, in *North German Lloyd* v. *Elting*, 48 F. (2) 547, 548, said:

> "If the alien was, as he claimed to be, returning to a United States domicile, he was not in an excluded class, but was absolutely entitled to enter."

In *Natali* v. *Day*, 45 F. (2) 112 (2d Cir.) the majority said at page 113:

> "Certainly, identification of aliens, if nothing more, is vital to the enforcement of the immigration laws and without inspection at the border any proper administration would be impossible."

Even the decision in *Ex parte Saadi*, 26 F. (2) 458 (9th Cir.) states at page 459:

> "The appellant, not having secured the (return) permit, inspection in his case was the official ascertainment of facts upon which depended his right to re-enter the United States, and it involved, at the very least, the determination of the question whether he had theretofore been lawfully domiciled in the United States, and whether he had temporarily gone into a foreign country with the intention to return."

It therefore follows, we respectfully submit, that the assumption in the majority opinion in the case at bar that Inspector Phillips was prevented from further inspection of Volpe by the alleged false statement, is not a correct assumption. This, for at least two reasons: (1) if Volpe had truthfully described his status (as he claims he did) to Inspector Phillips, the latter would not have given Volpe any further or additional inspection than that actually given (b) the government neither proved nor attempted to prove that Inspector Phillips failed to inspect Volpe as to "physical, educational and moral requirements."

We believe that this law is correctly interpreted and analyzed in *Ex parte Gouthro*, 296 Fed. 506 (D. C.), the opinion in which was on appeal approved and adopted by the Court of Appeals of the Sixth Circuit, 8 F. (2) 1023. The pertinent portion of that opinion is quoted by Judge Alschuler herein (R. 192) and for brevity we respectfully ask leave to refer thereto and to have this Court consider said quotation as set forth herein.

As heretofore stated, no contention is made or attempted by us justifying the making of false statements by aliens when entering the United States. However, we respectfully suggest, that the majority opinion is in error in appearing to assume that, since truth is desirable, punishment for a departure therefrom must be read into the statute by

including the words "false statement" within the meaning of the words "without inspection."

The rule so concisely stated by this Court in *Pirie* v. *Chicago T. & T. Co.*, 182 U. S. 438, 21 S. C. 906, 912, seems applicable here:

> "No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

In another case in considering some provisions of the Internal Revenue laws this Court recently laid down the rule governing situations such as this. In *Iselin* v. *U. S.*, 270 U. S. 245, 46 S. C. 248, 250, the Court said at page 250:

> "The statute is evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function. Compare *United States* v. *Weitzel*, 246 U. S. 533, 543; *Peoria* v. *Pekin Union Ry. Co.* v. *United States*, 263 U. S. 528, 534, 535."

The present case is even stronger for appellant than was the *Iselin case*. There the Court felt that the failure to have the statute cover the situation under consideration, was an inadvertence of Congress. Here it affirmatively appears that Congress did not intend to cover appellant's case by the law. (See pp. 26-27 of original brief.)

In another recent case, of desired assumption of power by an administrative department, the Court again refused to extend statutory language beyond its plain meaning. In *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 649, 51 S. Ct. Rep. 587, 590, the Court said:

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader

> powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions."

No cogent reason has been suggested by opposing counsel why the plain meaning of the words "without inspection" should not be adopted by the Courts. If Congress had intended to authorize deportation of one who made a false statement in entering, that body certainly would have said so. A simple clause, such as "who enters by means of a false statement" or "who makes a false statement in entering" would have expressed the Government's contention without difficulty or complexity. The omission of any such language from the law certainly was intentional on the part of the legislature. To hold otherwise, is to hold that Congress preferred to express itself by indirection rather than by direct statement and to impose upon the law the laborious and illogical circumlocution here contended for, viz., "who enters by means of false and misleading statements thereby entering without inspection." To put the situation mildly, this is a most uncertain and doubtful interpretation of the law and falls within the language of *Brown* v. *Zurbrick*, 45 F. (2) 931 (6th Cir.). Here the Court of Appeals, speaking of fact that deportation now means lifelong exile, said:

> "Whether, in view of this change in the results of a deportation order, the courts will construe more liberally the due process rights of a resident alien, is a question that will eventually call for consideration; here it is enough to say that, in applying the supposed statutory grounds of deportation to this alien, long rightfully domiciled here, the application must be clear, and cannot rest on doubtful interpretation."

(3) The government did not sustain the burden of proof to establish alienage of petitioner.

As heretofore noted, we respectfully suggest that the majority opinion of the Court of Appeals herein has misapprehended the evidence, resulting in its statement that Volpe "fraudulently" secured a naturalization decree. As noted in Judge Alschuler's opinion (R. 189) there was no proof of perjury or any other fraud in this connection.

We submit as strongly indicative of innocence on Volpe's part the fact that Mr. Schlottfeldt, at present the naturalization examiner in charge at Chicago, was not called as a witness to contradict Volpe's testimony regarding his naturalization case in 1920. Judge Alschuler justly remarks on the "protracted, repeated and microscopic investigation into his (Volpe's) life, for the purpose evident to me, of deporting him at all hazard." It therefore seems certain that if Volpe had committed any offense justifying cancellation of his naturalization judgment, Mr. Schlottfeldt would have produced proof thereof at the immigration hearing.

As noted in our original brief, although the records of the Circuit and Superior Courts of Cook County, Illinois, are in Chicago, no proof was attempted of cancellation of naturalization except the hearsay and interrogative statement of the inspector presiding at the hearing that, "the order admitting Antonio Volpe to citizenship was set aside and the certificate issued to him cancelled. Q. Is that correct?"

This statement does not say that the order was "set aside" by the court that entered it or indeed by any court, nor does it say by what officer or authority the certificate was "cancelled." In addition, of course, the statement does not describe any evidence, motion or order justifying

or supporting the hearsay conclusion of the inspector that the file showed that the order (judgment of naturalization) was set aside.

The reluctance of the government to produce proper proof of the claimed cancellation of Volpe's naturalization judgment is still more significant in view of the fact that such proof was necessary to the government's case in two respects, (a) to show alienage, and (b) to demonstrate falsity of the alleged representation to Inspector Phillips that Volpe was a naturalized citizen.

The rule is, of course, well established that failure of a party having the burden of proof, to produce evidence apparently within his power to produce, creates a presumption that such evidence if produced, would have been unfavorable to the party.

Lincoln Nat. L. Ins. Co. v. *Erickson*, 42 F. (2) 997, 1001.

Gulf, etc., R. Co. v. *Ellis*, 54 Fed. 481.

Hill v. *U. S.*, 234 Fed. 39.

Malouff v. *Pope*, 9 F. (2) 254.

Rather than produce the records of the Volpe naturalization proceedings or authentic copies thereof from the court in Chicago, the same city in which the immigration hearings were held, the immigration inspector made repeated efforts to induce appellant to say that he was a citizen of Italy and that his naturalization certificate had been cancelled. We quote for the information of the court:

Page 58 of the record (December 10, 1930):

"Q. Inasmuch as your father is a citizen of Italy, do you consider yourself also a citizen of Italy?

A. No, I wouldn't want to consider myself a citizen of Italy. I want to consider myself a citizen of the United States because my brothers are citizens.

Q. Under the Italian law, however, you are entitled to claim Italian citizenship, aren't you?

A. That I don't know."

(This examination was not in the presence of counsel.)

Page 60 of the record (December 10, 1930):

"Q. But your father is a citizen of Italy?

A. I don't know.

Q. But he has the first papers?

A. Yes, sir.

Q. But you take the citizenship of your father, don't you?

A. Well, I have a wife and children born here and I think I take the citizenship of the United States if I can have it.

Q. But under the law you could rightfully be considered a citizen of Italy, couldn't you?

A. I wouldn't want it.

Q. I will grant that you wouldn't want to be a citizen of Italy, but under the law you would be a citizen of Italy?"

(This examination was not in the presence of counsel.)

Page 21 of record (January 17, 1931):

"Q. Of what country are you a citizen?

A. Well, I asked my father, he says I am a citizen of Italy."

Page 22 of record (January 17, 1931):

"Q. Did you ever become a naturalized citizen of the United States?

A. Yes, sir, 1920, March 27.

Q. Are you still a citizen of the United States?

A. I have my first papers and I don't know, I applied for the second papers, already, January 6.

Q. What happened to your United States citizen papers that you did receive?

A. Well, the Chief Examiner, Mr. Fred Schlottfeldt, wrote me a letter and told me to bring in my papers, which I did. When I gave him the papers I asked Mr. Schlottfeldt what he wanted with the papers for, so he says, 'I want to cancel these papers,' and I said,

'Why do you want me to cancel these papers,' and I said, 'I got these papers from Judge David in good faith, I don't see why you want me to cancel these papers,' so he says, 'Well, if you don't cancel these papers I will have to hold you for perjury.' I said, 'Well, why do you want to hold me for perjury?' and he says, 'The best thing to cancel the papers because if you get a lawyer and go to court I will have to get you in court for perjury,' and I says, 'I don't know what I perjured,' but I gave him the papers and says, 'I will do what you want and apply for papers again. I was never convicted for anything.'

Inspector: The United States Naturalization file shows that one Antonio Volpe, petitioner 30179, was admitted to citizenship March 27, 1920, by Judge David, and on the following Saturday, April 3, 1920, the order admitting Antonio Volpe to citizenship was set aside and the certificate issued to him cancelled.

Q. Is that correct?

A. Well, I don't know that, I didn't know that they cancelled my papers.

Q. At that time that petition and application for citizenship under which you were granted citizenship was continued for further hearing, and it appears that you requested that your petition for naturalization be dismissed on March 28, 1924. Is that correct?

A. Well, that's the time that he asked me to sign the papers dismissed.

Q. Then you asked that your petition be dismissed at that time?

A. Well, I didn't know what else to do."

As shown by this record, appellant, although intelligent, is deficient in education and, of course, not versed in the law. He evidently did not consult counsel in the naturalization case, probably because of Mr. Schlottfeldt's warning above quoted not to do so.

Therefore, we respectfully submit, that the desire of the government to rely on confused statements of this comparatively illiterate man in preference to producing avail-

able court records, strongly indicates that such records would have been unfavorable.

We also respectfully submit that neither the indefinite above quoted hearsay statement of the presiding inspector that the naturalization order had been set aside nor the quoted confused statements of appellant furnish the necessary proof of alienage.

(4) The finding of the making of a false statement is not sustained by the evidence.

In our discussion of lack of proof of alienage, we called attention to the fact that there was no proper proof to establish that the naturalization judgment of 1920, had been legally cancelled, vacated or annulled, and, of course, such proof is necessary to demonstrate the falsity of the alleged statement by Volpe that he was a naturalized citizen.

In addition (assuming for purpose of discussion that entry without inspection includes entry with inspection involving false statement), certainly knowledge of the falsity of the statement by the maker would be essential and proof thereof would be necessary. In other words, a false statement innocently made would not subject the entrant to deportation. In the present case, the government did not attempt to make proof of knowledge. The only evidence is to the contrary.

Volpe testified (R. 23) that he did not know that "they cancelled my papers." He admitted that "he (the Naturalization Examiner) asked me to sign the papers dismissed." Apparently Volpe signed whatever the unnamed document presented to him by Mr. Schlottfeldt, but the record does not disclose that the document was used to

cause vacation of the judgment of naturalization, or that, if so used, Volpe had knowledge thereof.

In addition if our contention be sound (Sec. V, par. (2) of our original brief) that Volpe was subject to inspection only to establish United States domicile and return from a temporary absence in Cuba, any misstatement as to other matters would be immaterial and surely even the government's construction of the statute must concede at least that the misstatement must be material. Therefore we suggest that even were respondent's statutory construction to be preferred, nevertheless respondent's proof has entirely failed to show materiality of the alleged false statement.

The majority opinion of the Court of Appeals herein omits discussion of petitioner's contentions as to the insufficiency of the government's evidence, apparently on the ground that the reviewing court is not at liberty to weigh the evidence.

We respectfully submit that Inspector Phillips' testimony in its own nature and in view of the circumstances under which it was given, does not furnish "substantial evidentiary support" to the claim of false statement (J. Alschuler, R. 188), particularly in view of the contradiction thereof, directly by Volpe (R. 27, 55, 110), and Serritella (R. 34), and indirectly by Prignano (R. 31) and Pacelli (R. 37).

We respectfully submit that the consideration of testimony by the reviewing court to determine whether it affords support to the judgment, is an entirely different process than a mere weighing of the evidence. In *Security Life Ins. Co.* v. *Seeber*, 41 F. (2) 600, the Court of Appeals, 7th Circuit, so considered the evidence upon a conflict between two witnesses as to the time of mailing an insurance premium and reversed the judgment on the

ground that the testimony of the witness which was the basis for the jury's verdict was incredible and nullified by the testimony of one opposing witness and corroborating circumstances. The court says, at p. 601:

> "On the question of payment, the weight of the evidence is so overwhelmingly against the plaintiff, that we are of opinion that there should have been an instructed verdict on that point. *Chicago, M. & St. P. Ry.* v. *Coogan*, 271 U. S. 472, 478, 46 S. C. 564, 70 L. Ed. 1041."

One of the circumstances alluded to in our original brief (p. 33) we believe, is of sufficient importance to justify further explanation. Volpe's witnesses on all controverted matters were excluded from the hearing before testifying, being called in separately and examined without having heard the preceding testimony. (Prignano, R. 31; Serritella, R. 34; Pacelli, R. 36; Dr. Septimo de Cosola, R. 38; Ditchburne, R. 128.) This was in accordance with the long established custom of the Bureau of Immigration, at least in the Chicago office. However, when Inspector Phillips appeared, he was allowed to remain in the hearing room before testifying, without warning to counsel for Volpe that he was to testify or that his testimony was to be on the most vital elements of the case. In Mr. Phillips' presence before testifying, the presiding inspector called upon Volpe and identified him as the defendant in the case and as the Anthony Volpe named in Government Exhibit H who arrived from Cuba on June 24, 1928, at Key West, Fla. There was, of course, no reason for such identification of Volpe as these matters were not in dispute. However, Inspector Phillips then was called as a witness and stated he could identify Volpe by personal recollection. (R. 89.) That this irregular procedure was for the purpose of bolstering up Mr. Phillips' faulty recollection to have it appear extraordinarily good, is, we submit, a fair inference.

It should also be remembered that Mr. Phillips when testifying relied largely on the anonymous Government Exhibit H and also that doubtless he had had the benefit of reading the testimony given prior thereto by Volpe, Prignano, Serritella and Pacelli, which it was intended his testimony should overcome.

(5) The hearing was unfair.

The majority opinion of the Court of Appeals herein does not directly refer to our contentions in this respect. (Sec. VI of our original brief.) The majority opinion, however, seems to lend approval to some of the immaterial matters included in the record by remarking that petitioner admitted he had been arrested many times. In view of the fact that none of these arrests resulted in conviction, their immateriality seems apparent.

In contrast with the forcing of evidence of arrests into the record and of Volpe's supposed connection with Capone, "the gang leader" (R. 30), and Jacob Guzik, "recently sentenced for income tax evasion" (R. 30), was the refusal to allow petitioner to make explanation of his plea of guilty to counterfeiting, because of the fact that after a long trial, the jury disagreed and Mr. Volpe's limited finances would not carry him through a second trial, together with the fact that the trial judge (now deceased) indicated he would (as he did) impose only a thirty day sentence upon a plea of guilty. (R. 40-42.)

In addition the refusal of the government to produce material witnesses and documents as to which hearsay oral testimony was relied upon, rendered the hearing legally unfair.

Inspector Phillips claims an alien manifest was made in connection with the landing of the Volpe party at Key

West. He claims that he recalls Volpe did not state there was a question of cancellation of naturalization, because had Volpe done so Phillips would have placed his name on the alien manifest. (R. 99.) Clearly the alien manifest should have been produced as part of the records in the case, for the information of appellant's counsel and use in cross-examining Mr. Phillips. The presiding inspector flatly refused to produce the alien manifest at appellant's request. (R. 117.)

The hearsay statements of Morgan were used to bolster up the case against appellant and he should have been produced as a witness. (R. 103.) Phillips also claims he first received the citizen manifest and the alien manifest (as yet unseen by appellant's counsel) from Morgan. (R. 92.) If Morgan prepared these manifests or was present at their preparation, he knows whether Volpe concealed or disclosed the facts regarding his naturalization status and could settle the conflict between Phillips on the one hand and Volpe and his witnesses on the other. Also Morgan was present at the landing field when the plane arrived and doubtless could throw much light on what happened there during the inspection of Volpe. (R. 109.) Certainly he should have been produced for cross-examination.

> "The interests of truth clearly demanded cross-examination, and it should have been invited, not evaded." *Maltez* v. *Nagle*, 27 F. (2) 835, 837 (9th Cir.).

Likewise *Wong Yuen* v. *Prentis*, 234 Fed. 28 (7th Cir.) was entirely disregarded. The Court said at p. 30:

> "Where the issue is far less grave than the right to reside in this country of a human being claiming to be a citizen thereof, witnesses are frequently and properly brought long distances and at much expense to testify. The use by the government of *ex parte* state-

ments of persons whose oral testimony would have been conveniently, readily and inexpensively available might bear on the fairness of an administrative hearing such as this."

CONCLUSION.

It is submitted that the judgments of the Court of Appeals and of the District Court herein should be reversed.

Respectfully submitted,

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Attorney for Petitioner.

JOHN ELLIOTT BYRNE,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 724

UNITED STATES OF AMERICA EX REL. ANTHONY VOLPE, petitioner

v.

S. D. SMITH, DISTRICT DIRECTOR OF IMMIGRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUGGESTION OF ABATEMENT

Comes now the Solicitor General and suggests to the Court that this action has abated.

This suit was commenced by the filing on March 19, 1931, of a petition for a writ of habeas corpus in the District Court of the United States for the Northern District of Illinois, which alleged that Volpe, petitioner herein, was being illegally restrained of his liberty by Smith, the respondent herein, under the pretended authority of a warrant of deportation. (R. 2–7.) On the same day an order was entered by the District Court allowing the writ and directing that petitioner be released upon the filing of an appearance bond. (R. 8.)

The writ when issued was directed to Smith and was personally served upon him (R. 9) and on May 4, 1931, he filed a return in which he justified his detention of petitioner under and by virtue of the warrant of deportation (R. 10). After a hearing, the District Court ordered "that the petition for writ of habeas corpus be dismissed and the relator, Anthony Volpe, be remanded to the custody of the respondent, S. D. Smith, District Director of Immigration for deportation to Italy." (R. 155.) On June 15, 1931, the District Court allowed an appeal to the Circuit Court of Appeals for the Seventh Circuit, and admitted the petitioner to bail during the pendency of the appeal. (R. 163.) On June 21, 1932, the Circuit Court of Appeals rendered a decision in which it directed that the judgment of the District Court be reversed and the petitioner discharged (R. 169–178), but on October 29, 1932, it granted a petition by the Government for rehearing (R. 179), and on January 11, 1933, it filed an opinion and judgment affirming the order of the District Court (R. 179–186, 196). On February 1, 1933, it denied an application for rehearing filed on behalf of the petitioner. (R. 197.)

We are advised by the Department of Labor that Smith ceased to hold office as District Director of Immigration [1] in January, 1932, and that he was

[1] The Department of Labor informs us that District Directors of Immigration are appointed under authority of Sections 23 and 24 of the Immigration Act of 1917, c. 29, 39 Stat. 874, 892, 893.

succeeded by C. Alfred Palmer, who was appointed January 14, 1932, entered upon the duties of the office February 1, 1932, and took the oath of office March 3, 1932.

The record does not show any substitution of Palmer for Smith, and we are advised by the United States Attorney that no substitution was made in the Circuit Court of Appeals, where the case was pending when the change of officers occurred.

Under Section 11 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 941 (U. S. C., Title 28, Sec. 780), the time for substituting Palmer has long since expired, as that section permits the continuance of an action against the successor in office only where a satisfactory showing of the need for such continuance is made "within six months after [the predecessor's] death or separation from the office."

The decisions of this Court are unanimous in holding that no substitution may be made after the period provided in Section 11 (a) and that failure to substitute within that time requires the abatement of the action. See *LeCrone* v. *McAdoo,* 253 U. S. 217, 219; *United States ex rel. Claussen* v. *Curran,* 276 U. S. 590, 591; *Matheus* v. *United States ex rel. Cunningham,* 282 U. S. 802.

Respectfully submitted.

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W. MARVIN SMITH,
Attorney.

MARCH, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933